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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(El Dorado)

THE PEOPLE, Plaintiff and Respondent, v. GLYN WOLFGANG SCHARF, Defendant and Appellant.	C048480 (Super. Ct. No. P03CRF0248)

A jury found defendant Glyn Wolfgang Scharf guilty of first degree murder of his soon-to-be ex-wife, Jan Scharf,[1] who disappeared without a trace in May 2002. On appeal, defendant raises numerous claims of trial court error and prosecutorial and judicial misconduct, as well as contending the evidence was insufficient to support his conviction. Because we find no basis for reversal, we will affirm the judgment.

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[1] To avoid confusion and not out of any disrespect, we will refer to the victim by her first name.

FACTUAL AND PROCEDURAL BACKGROUND

Jan, an emergency room nurse, and defendant, a paramedic, were married in December 1988. In October 2001, Jan initiated divorce proceedings, but she and defendant continued to share a house in Cameron Park as the divorce proceeded. Sometime before Christmas 2001, defendant called Jan's daughter, Aimee Bautista, crying because he still loved Jan and did not want the divorce. He also told Jan that he wanted to work it out and that if he could not have her, no one could.

Around May 8, 2002, Jan's divorce attorney sent a letter to defendant with a proposed marital settlement agreement, which, if signed by the parties, would have been incorporated into a judgment for divorce, thus ending the Scharfs' marriage. Less than a week later, shortly before 8:00 p.m. on Tuesday, May 14, Jan spoke with Terrance Koch, a man she was dating, on her cellular phone as she drove home from work. Around 8:00 p.m., Leni Pink, who lived next door to the Scharfs, heard a woman's loud scream coming from the Scharfs' driveway, followed by the woman saying loudly, "No, no, don't, don't," then more screaming. Right after the screaming ended, she heard a car, possibly two, drive off quickly. When Pink's roommate, Barbara Slater, went outside at Pink's request to see if she could see anything, Slater noticed that defendant's truck, which had been in the driveway earlier, was gone.

Jan was never seen or heard from again. Jan's mother and daughter reported her missing on Saturday, May 18. The next

day, her car was found in the parking lot of the health club she frequented in Folsom.

Defendant was arrested in May 2003, following a lengthy investigation and charged with Jan's murder. After a 17-day trial in September and October 2004, during which 76 witnesses testified, a jury found defendant guilty of first degree murder. The trial court sentenced him to 25 years to life in prison. Defendant filed a timely notice of appeal.

DISCUSSION

I

Sufficiency Of The Evidence

Defendant first contends "[t]he record is devoid of the requisite substantial evidence to support a murder conviction." We conclude that defendant has failed to demonstrate the evidence was insufficient to support his conviction.

"The standard of review is well settled: On appeal, we review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence--that is, evidence that is reasonable, credible and of solid value--from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] '"[I]f the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder."' [Citation.] 'The standard of review is the same in cases in which the People rely mainly on circumstantial evidence. [Citation.] "Although it is the duty of the jury to

acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt."'" (*People v. Snow* (2003) 30 Cal.4th 43, 66.)

"An appellate court must accept logical inferences that the jury might have drawn from the circumstantial evidence." (*People v. Maury* (2003) 30 Cal.4th 342, 396.) "Before the judgment of the trial court can be set aside for the insufficiency of the evidence, it must clearly appear that on no hypothesis whatever is there sufficient substantial evidence to support the verdict of the jury." (*People v. Hicks* (1982) 128 Cal.App.3d 423, 429.)

Although the usual formulation of the standard of review, set forth above, could be read to suggest that we will review the record to determine if it contains substantial evidence to support the jury's verdict even if the defendant does nothing more than baldly assert that the evidence is insufficient, that is not the case. Perhaps the most fundamental rule of appellate law is that the judgment challenged on appeal is presumed correct, and it is the appellant's burden to affirmatively demonstrate error. (See *People v. $497,590 United States Currency* (1997) 58 Cal.App.4th 145, 152-153.) Thus, when a criminal defendant claims on appeal that his conviction was based on insufficient evidence of one or more of the elements of the crime of which he was convicted, we *must* begin with the

presumption that the evidence of those elements *was* sufficient, and the defendant bears the burden of convincing us otherwise. To meet that burden, it is not enough for the defendant to simply contend, "without a statement or analysis of the evidence, . . . that the evidence is insufficient to support the judgment[] of conviction." (*People v. Daniels* (1948) 85 Cal.App.2d 182, 185.) Rather, he must *affirmatively demonstrate* that the evidence is insufficient.

How does a defendant make such a showing? Perhaps the best way to understand that point is to understand how a defendant does *not* make such a showing. He does not show the evidence is insufficient by citing only his own evidence, or by arguing about what evidence is *not* in the record, or by portraying the evidence that is in the record in the light most favorable to himself. It has long been understood in the context of civil appeals, where the burden is likewise on the appellant to demonstrate that the evidence is insufficient, that "[a] recitation of only [the appellant's] own evidence or a general unsupported denial that any evidence sustains the findings is not the 'demonstration' contemplated under the rule." (*Green v. Green* (1963) 215 Cal.App.2d 31, 35.) It has also long been understood in civil appeals that an appellate court is "not required to search the record to ascertain whether it contains evidence that will sustain [the appellant's] contentions." (*Ibid.*) There is no reason in law or logic that these same principles should not apply in an appeal in a criminal case. These principles are fundamental to the very nature of appellate

review, and they must be respected by the criminal defendant who seeks review of his conviction as much as by the appellant in a civil case.

Thus, to prevail on a sufficiency of the evidence argument, the defendant must present his case to us consistent with the substantial evidence standard of review. That is, the defendant must set forth in his opening brief *all* of the material evidence on the disputed elements of the crime in the light most favorable to the People, and then must persuade us that evidence cannot reasonably support the jury's verdict. (See *People v. Dougherty* (1982) 138 Cal.App.3d 278, 282.) If the defendant fails to present us with all the relevant evidence, or fails to present that evidence in the light most favorable to the People, then he cannot carry his burden of showing the evidence was insufficient because support for the jury's verdict may lie in the evidence he ignores.

Such is often the case in criminal appeals, and such is the case here. Neither in his statement of facts, nor in his argument on the insufficiency of the evidence, does defendant set forth all of the material evidence on the issue of whether he murdered Jan, nor does he present what evidence he does set forth in the light most favorable to the People. From the testimony of 76 witnesses over the course of more than three weeks, defendant presents a statement of facts of little more than 14 pages, which vastly understates the prosecution's case and tends to focus on facts and testimony favorable to him -- including testimony the jury could have simply disbelieved, such

as claims by witnesses that they saw Jan after 8:00 p.m. on May 14, 2002. In contrast, the People (in a much smaller font) offer a statement of facts consisting of 39 pages devoted to the evidence presented in their case-in-chief, five pages to the defense evidence, and a final page to the evidence presented in rebuttal.

Just as lacking, if not more so, is defendant's argument regarding the sufficiency of the evidence. Rather than arguing about why all the material evidence presented in the light most favorable to the People is still not enough to prove Jan was murdered, let alone that he was the one who did it, defendant's argument focuses almost exclusively on what is *not* in the record, which he apparently contends precludes his conviction for murdering Jan.[2]

In a case such as this -- with no body and no physical evidence of a crime -- it can still be proved that the defendant

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[2] "No body was found. No homicide weapon was found. No ammunition was matched to a homicide weapon. No ammunition, firearm, syringe, pharmaceutical, or anything else seized in this case was ever linked to a homicide, let alone proved to be a homicide weapon. [¶] [A]ppellant never admitted harming Jan, let alone killing her. No physical evidence linked appellant to Jan's disappearance. There was no blood, DNA, or fingerprint evidence connecting appellant to Jan's disappearance. There was no evidence of flight or any attempt on appellant's part to disguise himself during the one-year interval between Jan's disappearance and appellant's arrest. . . . [A]ppellant cooperated with law enforcement by submitting to several sessions of questioning and providing consent and access for searches of his home. [¶] There was no evidence to show that appellant harbored malice aforethought, let alone premeditation, before Jan disappeared."

committed murder, but it must be proved circumstantially, which means that *all* of the circumstances must be viewed as a whole to determine whether, taken together, they are sufficient to prove beyond a reasonable doubt that the missing victim is dead and that the defendant intentionally caused the victim's death. (See, e.g., *People v. Scott* (1959) 176 Cal.App.2d 458.) This means that, to properly raise a challenge to the sufficiency of the evidence in a case like this, the defendant must present us with all of the circumstances shown by the evidence and persuade us that even in light of all those circumstances there is inadequate proof the victim is dead or that he intentionally killed her. Defendant has simply failed to meet that burden here.

We could end our analysis there, but if only to forestall a later claim of ineffective assistance of appellate counsel, we instead pause to note that the evidence the People cite in their argument on the sufficiency of the evidence is enough to support defendant's conviction. When taken as a whole and viewed in the light most favorable to the People, the evidence showed that Jan did not voluntarily disappear. Among other things, she was doing most of the planning for her daughter's wedding, which was set for December 2002; she had just applied for a promotion at work; and she was dating someone new and had plans to see him on May 16, two days after she disappeared. Moreover, people who knew her testified it was not in her nature to take off and not tell anyone, and her clothes, luggage, and makeup were left behind. In light of this (and other) evidence, the jury

reasonably could have found that Jan met with foul play, resulting in her death. (See, e.g., *People v. Ruiz* (1988) 44 Cal.3d 589, 610-611 ["ample circumstantial evidence of [victim's] death by foul play [found in] her abrupt disappearance, her failure to contact friends, relatives, her physician and her pastor, her failure to seek resumption of Medi-Cal and Social Security payments, and her abandonment of several personal effects"].)

The jury also reasonably could have found that defendant was responsible for Jan's disappearance. Viewed in the light most favorable to the People, the evidence showed that the last contact anyone had with her was shortly before her neighbor heard screams that the jury could have found occurred during a violent attack defendant committed on her just as she returned home from work on May 14. At that time, the divorce defendant did not want was moving toward its conclusion, and he had previously told a girlfriend that he was never going to allow another woman to do to him what his first wife had done, which was she had received the house in their divorce. Jan's car was found several days later in the parking lot of the health club she frequented, suggesting defendant planned her murder and tried to make it look like she was abducted while visiting the health club.

On the night of Jan's disappearance, defendant had had plans to spend the night at his girlfriend's house, but he canceled those plans that afternoon, telling her he had laundry to do. Two days later, however, he laundered his clothes at his

girlfriend's house, which he had never done before. Sometime later, after defendant was arrested for Jan's murder, a necklace and ring that belonged to Jan were found in a film canister hidden in some ivy in front of that house.

This is only a brief summary of the evidence presented in this case, but when that evidence is considered as a whole, we are persuaded it is sufficient to support defendant's murder conviction and defendant has failed to demonstrate otherwise.

II

Change Of Venue

On July 20, 2004, defendant filed a motion for change of venue, contending he could not receive a fair trial in El Dorado County due to "widespread and prejudicial pretrial publicity." In support of his motion, defendant submitted three packets of material: one containing newspaper articles about the case, a second containing printouts from the Internet about the case, and a third containing a list of television news broadcasts about the case.

On August 25, the court denied the motion without prejudice to its renewal following jury voir dire. In denying the motion, the court agreed there had been "significant attention paid to this case [in] the media," which was not unusual in the case of a murder charge with a missing victim, "[b]ut the media coverage in this case was clustered in certain points of time." In particular, the court found it "significant that it's been 10 months since there's been any, as far as I can tell from your evidence, significant or otherwise media attention to this case.

[¶] So that certainly serves to diminish by passage of time what perceptions or impressions or feelings there might be in the community about this case."

On September 14, a jury was selected. Defense counsel exercised only 9 of the 20 peremptory challenges available to him. (See Code Civ. Proc., § 231, subd. (a).)

On September 21, just before opening statement, defendant renewed his change of venue motion. The court noted that it had received responses to the juror questionnaire from about 77 prospective jurors. Thirty-two of the jurors said they had never heard of the case; the other 45 had. Of those 45, only 2 said they could not set aside what they had heard, so they were excused. Concluding "there isn't a reasonable possibility . . . based on the answers to those questionnaires that because of pretrial publicity that Mr. Scharf cannot get a fair trial," the court denied the change of venue motion.

On appeal, defendant contends the trial court erred in denying his change of venue motion because "[t]he extensive and inflammatory pretrial publicity rendered it reasonably likely that [he] could not receive a fair trial in El Dorado County." We find no error.

In a criminal case, when the defendant moves for a change of venue, the trial court must grant that motion "when it appears that there is a reasonable likelihood that a fair and impartial trial cannot be had in the county." (Pen. Code, § 1033, subd. (a).) "In reviewing the trial court's decision [denying a change of venue], we independently examine the record

to determine whether in light of the failure to change venue, it is reasonably likely that defendant in fact received a fair trial. [Citations.] The de novo standard of review applies to our consideration of the five relevant factors: (1) nature and gravity of the offense; (2) nature and extent of the media coverage; (3) size of the community; (4) community status of the defendant; and (5) prominence of the victim." (*People v. Sully* (1991) 53 Cal.3d 1195, 1236-1237.) "On appeal the appellant must demonstrate that the ruling was error because it was reasonably likely that a fair trial could not be had and that the error was prejudicial because a fair trial was in fact denied." (*People v. Hayes* (1999) 21 Cal.4th 1211, 1250.)

A

Nature And Gravity Of The Offense

"The peculiar facts or aspects of a crime which make it sensational, or otherwise bring it to the consciousness of the community, define its 'nature'; the term 'gravity' of a crime refers to its seriousness in the law and to the possible consequences to an accused in the event of a guilty verdict." (*Martinez v. Superior Court* (1981) 29 Cal.3d 574, 582.)

Defendant contends the nature and gravity of the offense here -- defendant's alleged murder of his estranged wife, after which the victim's body was never found -- "favored venue change." The People do not disagree; however, they do argue that the nature and gravity of the crime did not "'weigh *compellingly* in favor of a venue change.'" (Italics added.) (See *People v. Hamilton* (1989) 48 Cal.3d 1142, 1159 [husband's

murder of his pregnant wife for profit with a shotgun fired at close range did not weigh compellingly in favor of a venue change].) We agree.

B

Size Of The Community

"In a small town, in contrast to a large metropolitan area, a major crime is likely to be embedded in the public consciousness with greater effect and for a longer time. [Citation.] Thus, . . . when trial is scheduled in a small rural community, even though the publicity is not inflammatory and not hostile toward the defendant, the courts have granted" a change of venue. (*Martinez v. Superior Court*, *supra*, 29 Cal.3d at p. 581.)

The estimated population of El Dorado County in 2004 was 168,100, and the trial court characterized the county as "more in a suburban/rural-type nature." Defendant contends "[t]he small size of [this] relevant community favors a venue change." Again, the People do not disagree, but instead argue that "this factor does not weigh *heavily* in favor of a change of venue." (Italics added.) (See *People v. Proctor* (1992) 4 Cal.4th 499, 525-526 [population of Shasta County (approximately 122,100) weighed "somewhat in favor of a change of venue"].) Again, we agree.

C

Community Status Of The Defendant

The status of the defendant as a stranger or undesirable person in the community may weigh in favor of a change of venue.

(See *Martinez v. Superior Court*, *supra*, 29 Cal.3d at pp. 584-585.) The trial court here noted that defendant was a "prominent person" in the community, having lived in the county for 15 years and having served on the board of the community services district for Cameron Park. Defendant contends, however, that press coverage of the case portrayed him in "unfavorable terms," and therefore his community status favored a change of venue.

We will address the nature and extent of the media coverage below. In the absence of that coverage, there was nothing about defendant's status in the community that suggested a change of venue was necessary. Thus, this factor did not support a venue change.

D

Prominence Of The Victim

The victim's status in the community as "well known or well liked, or both," may weigh in favor of a change of venue. (*Martinez v. Superior Court*, *supra*, 29 Cal.3d at p. 584.) Here, defendant points to nothing to show Jan was prominent in the community before her disappearance. To the extent media coverage gave Jan a certain amount of prominence after she disappeared, we consider that as part of the nature and extent of the media coverage. Otherwise, this factor did not support a change of venue.

E

Nature And Extent Of The Media Coverage

As the trial court recognized, the most important factor here was the nature and extent of the media coverage. Defendant contends, "[t]he jury pool was exposed to a flood of publicity about this case" because "[t]here were more than 500 local television news stories about this case between July 2002 and November of 2003." He also argues, "[t]he news media coverage was inflammatory and sensational," depicting him "as an immoral outlaw," and depicting Jan "as a highly valued nurse and beloved member of the community."

The possibility of an unfair trial may arise from news coverage that is inflammatory or productive of overt hostility or from widespread publicity that describes facts, statements, and circumstances which tend to create a belief in the guilt of someone charged with a crime. (*Martinez v. Superior Court*, *supra*, 29 Cal.3d at p. 580.) Of course, "the impact of the publicity may be mitigated due to the lapse of time between publication or issuance of news reports and commencement of jury selection." (*People v. Proctor*, *supra*, 4 Cal.4th at p. 525.)

The evidence defendant produced in support of his change of venue motion showed that local television news in Sacramento reported on Jan's disappearance almost daily for a month between May 19, 2002 -- five days after she was last seen -- and June 18, 2002. Additional reports were made around July 15, 2002, relating to a celebration of her birthday, and then again around July 23, 2002, relating to the discovery of a body in Folsom

(which turned out to be someone else). A few reports about the use of a psychic to locate her appeared in August, then nothing appeared until January 2003, when Jan's disappearance returned to the news briefly, fueled by the disappearance of Laci Peterson.

News reports appeared again in May 2003, around the one-year anniversary of Jan's disappearance. Then, beginning on May 16, 2003, reports appeared for five straight days reporting on defendant's arrest and arraignment for Jan's murder. There was a cluster of reports in early June on defendant's plea to the charge, then reports again at the end of June and beginning of July on his bail hearing. There was then a three-month gap in reports on the case, until the preliminary hearing at the end of October 2003. The final television news on the case appearing in the record occurred near the end of November 2003, when defendant again entered a not guilty plea.

The initial reports in the month after Jan's disappearance portrayed her in a favorable light, with friends commenting that she was a nurse who was responsible, reliable, well-liked, and very nice. But contrary to defendant's argument, nothing on the television news portrayed him as "an immoral outlaw." In the first month of coverage, there was a mention that defendant refused to take a lie detector test, and also mention of Jan's belief that defendant was poisoning her. At the same time, however, reports included assertions that defendant would not "do anything like that," and it was reported that authorities were considering whether Jan might have been abducted by a

stranger or someone she met over the Internet or disappeared voluntarily. Other reports indicated there was no physical evidence of foul play, and no clues or suspects in the case. Both individually, and as a whole, the television coverage was neither inflammatory nor overtly hostile to defendant, nor did it include facts, statements, and circumstances which would have tended to create a belief in defendant's guilt.

The record also contains two articles from the Sacramento Bee reporting on the preliminary hearing in November 2003, and 16 articles from the Mountain Democrat published between July 25, 2002, and January 16, 2004. Although these articles contained more facts than the television news reports, they were again neither inflammatory nor overtly hostile to defendant. Similar are the printouts of approximately 28 articles posted on media Internet websites between May 2002, and November 2003.

There is also evidence Jan's name appeared in a broadcast of Good Morning America on June 5, 2002, although the substance of that broadcast is not contained in the record.

In summary, while the local news coverage of Jan's disappearance and defendant's subsequent arrest for her murder was extensive at times, there was little about that coverage that tended to suggest defendant could not be fairly tried in El Dorado County. It must be emphasized that most of the news coverage appears to have ceased in November 2003, following the preliminary hearing, which was 10 months before the jury was selected in September 2004. "The passage of time weighs heavily

against a change of venue." (*People v. Sanders* (1995) 11 Cal.4th 475, 506.)

Defendant points out that a majority of the potential jurors, as well as a majority of the actual jurors, admitted having been exposed to pretrial publicity about the case. However, "It is not necessary that jurors be entirely ignorant of the facts and issues involved in the case; it is sufficient that they can lay aside their opinions and impressions and render a verdict based on the evidence presented at trial." (*People v. Sanders*, *supra*, 11 Cal.4th at p. 506.) Here, only 2 out of approximately 77 potential jurors said they could not set aside what they had heard, and they were dismissed for cause. In *Sanders*, our Supreme Court found it significant that only 1 out of about 100 potential jurors stated "she would be unable to decide the case fairly because of the publicity to which she had been exposed." (*Id.* at pp. 505, 506.)

Finally, we find it critical that defense counsel used less than half of the peremptory challenges available to him before accepting the jury panel and the alternate jurors. "The failure to exhaust peremptories is a strong indication 'that the jurors were fair, and that the defense itself so concluded.'" (*People v. Price* (1991) 1 Cal.4th 324, 393, quoting *People v. Balderas* (1985) 41 Cal.3d 144, 180.) Indeed, in *People v. Daniels* (1991) 52 Cal.3d 815, the Supreme Court found defense counsel's failure to exhaust his peremptory challenges "decisive" in rejecting the defendant's challenge to the denial of his motion for change of venue after jury selection, stating: "In the absence of some

explanation for counsel's failure to utilize his remaining peremptory challenges, or any objection to the jury as finally composed, we conclude that counsel's inaction signifies his recognition that the jury as selected was fair and impartial." (*Id.* at p. 854.)

Viewing all of the relevant factors together, this passage from our Supreme Court's opinion in *Sanders* best expresses our conclusion regarding defendant's change of venue motion: "We cannot discern a reasonable likelihood that the jurors chosen for defendant's trial had formed such fixed opinions as a result of pretrial publicity that they could not make the determinations required of them with impartiality." (*People v. Sanders*, *supra*, 11 Cal.4th at pp. 506-507.) Accordingly, we find no error in the denial of a change of venue from El Dorado County.

III

Evidentiary Issues

A

Jan's Statements To Law Enforcement Officers

Before trial, the prosecution sought permission to offer into evidence various statements Jan made to people before her disappearance. The statements the prosecution sought to offer into evidence included the following two statements to law enforcement officers:

1) On May 7, 2002, Jan reported to Detective Greg Brown of the El Dorado County Sheriff's Department that she believed defendant was poisoning her.

2) On April 17, 2002, Jan reported to Deputy Kevin Pebley of the El Dorado County Sheriff's Department that her .38 caliber Smith & Wesson gun was missing from her closet and defendant had it.

The prosecution argued Jan's statements to the officers were admissible under Evidence Code section 1350 (statement by a witness who was made unavailable to testify by the party against whom the statement is offered). In making that argument, the prosecution asserted that Jan's statement to Detective Brown was "highly relevant to show that the defendant was in fact poisoning [Jan] and that he was acting in a hostile manner toward [Jan]." The prosecution offered a similar assertion regarding Jan's statement to Deputy Pebley. The prosecution further argued that although Jan's statements to the officers were "testimonial" in nature, they were not subject to a confrontation clause objection under *Crawford v. Washington* (2004) 541 U.S. 36 [158 L.Ed.2d 177] because even under *Crawford*, the rule of "forfeiture by wrongdoing" prohibits a defendant from asserting a confrontation clause objection to hearsay statements made by an unavailable declarant when the defendant "himself, is responsible for the fact that [the declarant] is unavailable as a witness."

Defendant opposed the prosecution's motion, essentially asserting that the rule of forfeiture by wrongdoing cannot be applied to a criminal defendant when the wrongdoing that allegedly resulted in the witness's unavailability is the offense for which the defendant is on trial. Defendant did not

address the applicability of Evidence Code section 1350 because he believed the confrontation clause objection under *Crawford* was sufficient to bar admission of the statements.

At a hearing on the motion, the prosecution argued that if a hearsay statement meets the requirements of Evidence Code section 1350, then it is also admissible over a confrontation clause objection under the rule of forfeiture by wrongdoing. The trial court agreed and scheduled an Evidence Code section 402 hearing to determine whether there was clear and convincing evidence that defendant was responsible for Jan's unavailability. (See Evid. Code, § 1350, subd. (a)(1).)

Before the Evidence Code section 402 hearing, the prosecution determined there was no evidence of a particular substance (digoxin) in Jan or her coffee, as the prosecution had previously thought. Nevertheless, the prosecution continued to assert that the evidence Jan believed defendant was poisoning her -- including her statements to Detective Brown -- should be admitted "to show [Jan's] state of mind as well as the fact that the defendant was poisoning her."

At the Evidence Code section 402 hearing, Deputy Pebley testified about Jan's report of the missing gun. According to Deputy Pebley, Jan told him her gun was missing and she suspected defendant took it because defendant told her he did. She also told Deputy Pebley she was making the report because "she wanted to get it on record that she was no longer in possession of the gun in case it was used in a crime," and she did not want a theft report pursued because she was afraid of

retaliation from defendant. More specifically, Jan told Deputy Pebley she thought defendant's poisoning of her might continue if he was contacted about the theft of the gun.

Because Deputy Pebley's testimony established that Jan's statement was not tape-recorded or included in a notarized written statement signed by Jan, it was not admissible under Evidence Code section 1350.[3] (See Evid. Code, § 1350, subd. (a)(3).) Accordingly, the prosecution now argued that Jan's statement to Deputy Pebley either did not contain any hearsay at all or was admissible over a hearsay objection under Evidence Code section 1241 (statement to explain conduct) or section 1250 (statement of then-existing state of mind).

In response, defendant contended Jan's statement to Deputy Pebley was irrelevant, whether offered for a hearsay or nonhearsay purpose, and was not trustworthy.

The trial court ultimately concluded that Jan's statement to Deputy Pebley was a "testimonial statement[] made to a police officer," but was nonetheless admissible over a confrontation clause objection under the rule of forfeiture by wrongdoing. The court further concluded the statement was admissible over a hearsay objection "under [Evidence Code section] 1241 to explain her conduct in making the report" and admissible "under [Evidence Code section] 1250, [because] her state of mind that she was in fear of Mr. Scharf is relevant to explain the

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[3] In contrast, Jan's report of her suspected poisoning to Detective Brown *was* tape-recorded.

ultimate question here as to whether or not Mr. Scharf is responsible for her death."

As for Jan's statement to Detective Brown, the trial court concluded it was admissible under Evidence Code section 1350. In explaining the relevance of that statement, the court stated, "It goes to her state of mind, not admissible to show that Mr. Scharf may have poisoned her, but that, number one, she still remained in the house. In fact, she offers the explanation for the reason they stayed there is he was only trying to make her sick, to make her dependent on him, not to kill her. And that explains why she continues to stay. [¶] And despite the normal rationalization of this to everyone else, why would you stay if you thought someone was poisoning you? Well, she offers that explanation and makes more understandable her state of mind and her subsequent conduct in remaining despite all that."

At trial, Deputy Pebley testified that on April 17, 2002, Jan reported that a handgun was missing from her closet and that defendant had told her he had it. She further told him she just wanted the incident documented to protect herself, and she did not want him to pursue any kind of theft investigation.[4]

After Deputy Pebley testified, the prosecution called Deputy Jason Bloxsom. Deputy Bloxsom testified that on May 4,

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[4] Although Deputy Pebley testified at the Evidence Code section 402 hearing that Jan said she did not want him to pursue a theft report because she was afraid defendant would continue poisoning her, at trial Deputy Pebley testified Jan did not tell him why she did not want him to pursue the matter.

2002, Jan reported to him that she felt she was being poisoned by defendant.[5]

Later during the trial, Detective Brown testified and authenticated a tape recording of a telephone interview he had with Jan on May 7, 2002, and the tape was played for the jury.[6] In that interview, Jan explained her suspicion that defendant was putting something in her morning coffee to make her sick.

On appeal, defendant contends the admission of Jan's statements to Deputies Pebley and Bloxsom and to Detective Brown violated the confrontation clause because the rule of forfeiture by wrongdoing does not apply. Defendant also contends the trial court erred in admitting Jan's statements to Detective Brown under Evidence Code section 1350.

1. *Forfeiture By Wrongdoing*

We begin with defendant's constitutional argument, since that argument is addressed to the testimony of all three law enforcement officers.

In *Crawford v. Washington*, the United States Supreme Court held that "admission of testimonial evidence from a witness who does not testify violates the confrontation clause, unless the

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[5] Deputy Bloxsom was not mentioned in the prosecution's original pretrial motion to admit Jan's statements before her disappearance, but at one point during the discussion of admitting Jan's statements to Detective Brown, the prosecutor did mention Deputy Bloxsom.

[6] By agreement of the parties, the tape was edited to remove any mention of digoxin.

witness is unavailable and the defendant has had a prior opportunity for cross-examination." (*People v. Mitchell* (2005) 131 Cal.App.4th 1210, 1221.) The *Crawford* court noted, however, that there are "exceptions to the Confrontation Clause," one of which is "the rule of forfeiture by wrongdoing," which "extinguishes confrontation claims on essentially equitable grounds." (*Crawford v. Washington*, *supra*, 541 U.S. at p. 62 [158 L.Ed.2d at p. 199].)

In mentioning the rule of forfeiture by wrongdoing, the Supreme Court cited *Reynolds v. United States* (1878) 98 U.S. 145 [25 L.Ed. 244]. In *Reynolds*, the court stated, "The Constitution gives the accused the right to a trial, at which he should be confronted with the witnesses against him; but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away. The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants him the *privilege* of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege. If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated." (*Id.* at p. 158 [25 L.Ed. at p. 247].)

Assuming for the sake of argument that Jan's statements to the three law enforcement officers were "testimonial" within the

meaning of *Crawford*,[7] the question defendant poses is whether the doctrine of forfeiture by wrongdoing applies when the alleged wrongdoing that made the witness unavailable is the crime for which the defendant is on trial.[8] According to defendant, "[t]he forfeiture principle is designed to prevent a defendant from thwarting the normal operation of the criminal justice system by eliminating a witness to a pending prosecution." Defendant further contends that "[t]he majority of federal court decisions apply the doctrine to situations in which the accused has allegedly procured the unavailability of a witness to the offense for which the defendant is on trial, not to the situation in which the alleged wrongdoing is the very same offense for which the defendant is on trial." (Italics omitted.)

The federal court decisions defendant cites in support of his argument are not particularly helpful because for the most part they do not directly address whether forfeiture by wrongdoing applies when the alleged wrongdoing and the crime for which the defendant is on trial are one and the same. Nevertheless, there is language in at least one of those opinions that tends to support defendant's position. In *U.S. v.*

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[7] As an alternative argument, the People contend they were not.

[8] This question is presently pending before our Supreme Court. (*People v. Giles*, review granted Dec. 22, 2004, S129852.)

Houlihan (1st Cir. 1996) 92 F.3d 1271, the court stated that "a defendant who wrongfully procures a witness's absence *for the purpose of denying the government that witness's testimony* waives his right under the Confrontation Clause to object to the admission of the absent witness's hearsay statements." (*Id.* at p. 1279, italics added.) That language tends to support defendant's position here because, logically, a defendant who kills a person and is then put on trial for murder cannot be deemed to have killed that person with the intent to deny the government that person's testimony in the very murder case in which that person is the victim.

The issue in *Houlihan*, however, was whether forfeiture by wrongdoing applies to wrongdoing that occurs before formal charges are filed -- that is, when the defendant kills a potential witness, rather than an actual witness. (*U.S. v. Houlihan*, *supra*, 92 F.3d at pp. 1279-1280.) Since the *Houlihan* court was not confronted with the exact question we confront, the formulation of the forfeiture by wrongdoing rule in that case does not carry any particular force here.

The People, on the other hand, cite a number of federal and state cases in which the forfeiture by wrongdoing rule was expressly applied where the wrongdoing was the same as the crime for which the defendant was on trial. (See, e.g., *U.S. v. Emery* (8th Cir. 1999) 186 F.3d 921, 926.) In one of those cases -- *U.S. v. Garcia-Meza* (6th Cir. 2005) 403 F.3d 364 -- the appellate court specifically rejected the argument that forfeiture by wrongdoing does not apply unless the defendant

"killed or otherwise prevented the witness from testifying with the specific intent to prevent her from testifying" (*id.* at p. 370) -- i.e., the argument that could be derived from the formulation of the rule in *Houlihan*. According to the *Garcia-Meza* court, "There is no requirement that a defendant who prevents a witness from testifying against him through his own wrongdoing only forfeits his right to confront the witness where, in procuring the witness's unavailability, he intended to prevent the witness from testifying. Though the Federal Rules of Evidence may contain such a requirement,[**9**] [citation], the right secured by the Sixth Amendment does not depend on, in the recent words of the Supreme Court, 'the vagaries of the Rules of Evidence.' [Citation.] The Supreme Court's recent affirmation [in *Crawford*] of the 'essentially equitable grounds' for the rule of forfeiture strongly suggests that the rule's applicability does not hinge on the wrongdoer's motive. The Defendant, regardless of whether he intended to prevent the witness from testifying against him or not, would benefit through his own wrongdoing if such a witness's statements could not be used against him, which the rule of forfeiture, based on principles of equity, does not permit." (*U.S. v. Garcia-Meza*, *supra*, 403 F.3d at pp. 370-371.)

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9 Evidence Code section 1350 contains a similar requirement in that it requires "clear and convincing evidence that the declarant's unavailability was knowingly caused by, aided by, or solicited by the party against whom the statement is offered *for the purpose of preventing the arrest or prosecution of the party*." (Evid. Code, § 1350, subd. (a)(1), italics added.)

We are persuaded by the reasoning in *Garcia-Meza*. In essence, the rule of forfeiture by wrongdoing is rooted in the equitable principle that a person should not be allowed to benefit from his own misconduct. (See Civ. Code, § 3517 ["No one can take advantage of his own wrong"].) A murderer who is able to exclude his victim's statements from evidence because his victim is dead benefits from his wrongdoing, regardless of whether he specifically intended to prevent the victim/witness from testifying when he committed the murder.

Defendant contends "[i]t is blatant bootstrapping to base the use of a decedent's hearsay accusations on a presumption of guilt of the charged offense." But there is no presumption of guilt in a case such as this. On the contrary, the presumption is that the defendant did *not* make the victim unavailable to testify, and the People -- who seek to offer into evidence the victim's hearsay statements -- bear the burden of convincing the court otherwise, as a preliminary fact, before the statements can be admitted. Furthermore, the court's determination, as a matter of preliminary fact, that the defendant killed the victim does not intrude on the role of the jury in determining whether the defendant committed the murder, or the presumption of innocence the jury must apply in making that determination. As one federal court recently explained, "the jury will never learn of the judge's preliminary finding. [Citation.] Moreover, the jury will use different information and a different standard of proof to decide the defendant's guilt. [Citation.] [Also], analogous evidentiary situations permit a judge to determine

preliminary facts even though the exact same facts may be necessary to the jury's final verdict. For example, statements offered against a defendant to prove his participation in a charged conspiracy are admissible if the court first finds, by a preponderance of the evidence, that the conspiracy for which defendant is on trial existed." (*U.S. v. Mayhew* (S.D. Ohio 2005) 380 F.Supp.2d 961, 968, fn. omitted.)

In summary, we conclude the trial court did not err in applying the rule of forfeiture by wrongdoing in this case.

2. *Jan's Statement To Detective Brown*

Defendant next contends the trial court erred in admitting Jan's statement to Detective Brown under Evidence Code section 1350.

The People concede that, contrary to the trial court's ruling, the statement to Detective Brown was not admissible under Evidence Code section 1350 because "there is no evidence that [defendant] killed Jan 'for the purpose of preventing [his] arrest or prosecution.'" (Evid. Code, § 1350, subd. (a)(1).) The People contend, however, that Jan's statement to Detective Brown *was* admissible under Evidence Code section 1250, and therefore there was no error in its admission. (See *People v. Martinez* (2003) 113 Cal.App.4th 400, 408 ["When a trial court erroneously relies on one hearsay exception to admit evidence that otherwise would have been admissible under a different exception, it cannot be said that the evidence was admitted in error"].)

Subdivision (a) of Evidence Code section 1250 provides in relevant part that, "Subject to Section 1252, evidence of a statement of the declarant's then existing state of mind . . . is not made inadmissible by the hearsay rule when: [¶] (1) The evidence is offered to prove the declarant's state of mind . . . at that time or at any other time when it is itself an issue in the action; or [¶] (2) The evidence is offered to prove or explain acts or conduct of the declarant."[10]

The People contend Jan's statement to Detective Brown -- essentially, that she suspected defendant was poisoning her coffee to make her sick -- was a statement of her state of mind offered to prove her state of mind or to explain her conduct. The People further contend that "[e]vidence that Jan was interested in initiating an investigation into whether she was being poisoned tended to show that she had no intention of leaving the area and her disappearance was the result of foul play."

According to defendant, the People "fail[] to explain how Jan's state of mind or conduct was in issue in this case," and these arguments "boil[] down to an assertion that Jan's initiation of a police investigation and expressed suspicion that [defendant] was poisoning her were relevant as back-door

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[10] Evidence Code section 1252 provides that "[e]vidence of a statement is inadmissible under this article if the statement was made under circumstances such as to indicate its lack of trustworthiness." Defendant raises no issue regarding Evidence Code section 1252.

evidence . . . that [defendant] killed her," which is impermissible.

Contrary to defendant's argument, Jan's state of mind and conduct *were* at issue in this case, and the evidence of her report to Detective Brown was relevant to prove her state of mind and explain her conduct. As in other missing-body homicide cases where there is no direct or physical evidence the victim was killed, to prove the crime of murder the prosecution had to convince the jury that Jan would not have disappeared voluntarily. (See, e.g., *People v. Scott*, *supra*, 176 Cal.App.2d at pp. 464, 465, 489.) Thus, Jan's state of mind and conduct shortly before her disappearance -- more particularly, whether she was thinking of leaving or acting like she was going to leave -- were important issues in the case.

In her statement to Detective Brown, a week before she disappeared, Jan expressed her belief that defendant was poisoning her coffee, not to kill her, but "to make [her] sick so that [she would] have to take him back to take care of [her]." Despite this suspicion, Jan told Detective Brown she was not in fear for her safety. She also made arrangements to get a sample of her coffee to Detective Brown, who planned to submit it for testing to the Department of Justice. She asked Detective Brown how long such testing usually takes, and he told her he did not know but would try to find out. Jan also told Detective Brown she would try to find out defendant's schedule and would let Detective Brown know, so Detective Brown could contact defendant.

Taken as a whole, Jan's statement to Detective Brown tended to show that despite her suspicion defendant was poisoning her coffee to make her sick, she had no plans to flee or get away from defendant. On the contrary, she intended to remain in the house and gather samples of her coffee and submit them for testing, which would take an unknown amount of time. In essence, Jan's statement to Detective Brown tended to show she was not thinking of leaving or acting like she was going to leave a week before her disappearance, and thus the evidence tended to prove she did not disappear voluntarily -- an issue of critical importance to the prosecution's case. Under these circumstances, the trial court did not err in admitting Jan's statement to Detective Brown.[11]

B

Jan's Statements To Others

In addition to the arguments addressed above, defendant asserts error in the admission of testimony by 13 different witnesses about statements Jan made to them. To understand our resolution of this issue, it is necessary to understand the extensive pretrial proceedings addressing the admissibility of Jan's statements to others.

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[11] Defendant does not contend that even if Jan's statement to Detective Brown was probative of her state of mind, the probative value of the evidence was outweighed by its potential prejudicial effect. (See Evid. Code, § 352.) Accordingly, we do not address that issue.

As we have noted, before trial the prosecution sought an order allowing into evidence various statements Jan made to people before her disappearance. In addition to Jan's statements to Detective Brown and Deputy Pebley, the prosecution sought to offer into evidence certain statements Jan made to her friend and coworker, Marcie Flores; to a man she was dating, Terrance Koch; to a post office clerk, Mary Luebbert; and to her daughter, Aimee Bautista (among others).

Defendant filed a written response to that motion, asserting specific objections to each of the specific statements the prosecution wanted to offer.

The trial court first considered the prosecution's motion at a hearing on June 28, 2004. The court and counsel discussed the various statements at length, and the court eventually concluded that an Evidence Code section 402 hearing would be necessary to determine the admissibility of the statements made to Flores, Koch, Luebbert, and Bautista.

On August 27, 2004, the prosecution filed a brief in advance of the Evidence Code section 402 hearing. That brief included a lengthy offer of proof detailing the anticipated testimony of 66 witnesses, which the prosecution contended would prove defendant murdered Jan and thus was responsible for her unavailability.

The Evidence Code section 402 hearing began on September 7, with the testimony of Deputy Pebley. Before the hearing, the prosecution had filed an addendum to its brief adding the anticipated testimony of three more witnesses to the offer of

proof. These witnesses included two of Jan's coworkers, Louis Small and Liz Andrade. When the court finished with the issue of Deputy Pebley's testimony, the court raised the three new witnesses listed in the prosecution's addendum. Because Andrade's anticipated testimony included statements Jan made to her, the court and counsel began discussing the admissibility of those statements. The court ultimately determined that Andrade should testify at the Evidence Code section 402 hearing to determine the admissibility of the statements Jan made to her. The court also determined that Small should testify at the Evidence Code section 402 hearing, even though his anticipated testimony (as identified by the prosecution) did not involve any statements Jan made to him.

On September 8, the Evidence Code section 402 hearing continued with Small's testimony. During his direct examination, Small testified (beyond the offer of proof) about various statements Jan had made to him, including that she owned a gun because she was afraid of defendant.

Flores testified next. The court and counsel then addressed the admissibility of Small's testimony, with defense counsel offering specific objections to Small's proposed testimony about the gun and the trial court's ruling on those objections. The court and counsel then addressed the admissibility of Flores's testimony at some length, and the court made its rulings.

Later that day, Koch testified at the Evidence Code section 402 hearing. The court and counsel then addressed the

admissibility of Koch's testimony, and the court made its rulings.

After discussion of an unrelated issue, Andrade testified. The court and counsel then addressed the admissibility of her testimony, and the court made its rulings.

The next day, after another witness (not at issue here), Luebbert testified. The court and counsel then addressed the admissibility of her testimony, and the court made its rulings.

Later that afternoon, Bautista testified. The court and counsel then addressed the admissibility of her testimony, and the court made its rulings.

On appeal, defendant seeks to challenge the trial court's admission of the testimony of 13 different witnesses about statements Jan made to them. Rather than addressing each witness's testimony separately, however, along with the trial court's rulings on any objections he made to that testimony, defendant simply identifies two broad categories of statements Jan made, one of which he characterizes as "Jan's hearsay accusations" and the other of which he characterizes as "Jan's statements of fear." Under the first category, he lists accusations Jan made against him on 10 different topics, and for each topic he lists the witnesses (ranging from one to seven) to whom Jan made an accusation on that topic. Under the second category, he identifies three incidents involving three different witnesses to whom Jan made statements that she feared him. Without differentiating between the different witnesses, and the trial court's specific rulings on their testimony,

defendant then simply argues across the board that "Jan's hearsay accusations were inadmissible" and "Jan's hearsay statements expressing fear . . . were inadmissible," and that admission of this hearsay violated his rights under the Fifth, Sixth, and Fourteenth Amendments.

This shotgun approach to appellate advocacy is unacceptable. Even in a criminal case, a judgment challenged on appeal is presumed correct, and it is the appellant's burden to affirmatively demonstrate error. (*People v. $497,590 United States Currency*, *supra*, 58 Cal.App.4th at pp. 152-153.) "It is elementary that an appellate court will not search for error in order to reverse a judgment of a trial court, and that, unless the appellant shows prejudicial error, the judgment must be affirmed." (*People v. Schenk* (1937) 19 Cal.App.2d 503, 505.) Furthermore, when a claim of error is predicated on the admission of evidence at trial, we generally cannot reverse a judgment based on the alleged error unless "[t]here appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion." (Evid. Code, § 353, subd. (a).) This means a defendant who claims the trial court admitted evidence against him in error must identify, with appropriate citations to the record on appeal: (1) exactly what evidence he contends was admitted in error; (2) exactly what objections he made to the evidence; and (3) exactly what rulings the trial court made on those objections.

Defendant has not done that here. For example, he contends that after the prosecution moved in limine to admit testimony about various statements Jan made to various witnesses, his written opposition to that motion "objected that all Jan's hearsay accusations violated the Confrontation Clause, lacked probative value, were untrustworthy, and were unduly prejudicial under Evidence Code section 352." As we have noted, however, defendant's written response to the prosecution's motion asserted specific objections to each of the specific statements the prosecution wanted to offer from the specific witnesses identified in that motion. On appeal, defendant does not separately address the objections he made to each witness's proposed testimony, choosing instead to address all of the proposed testimony as though he made the same objections to every statement to be offered by every witness, which he did not do.

Similarly, as we have explained, throughout the course of an Evidence Code section 402 hearing that extended over several days, the court and counsel separately addressed the admissibility of the testimony of each of the witnesses who testified at the Evidence Code section 402 hearing, including Small, Flores, Andrade, Koch, Luebbert, and Bautista. Rather than separately discussing the objections he made to the proffered testimony of each of these witnesses, and separately addressing the court's rulings with regard to each witness, on appeal defendant simply contends, "In hearings, defense counsel objected that the proffered hearsay was speculation, unreliable,

inadmissible to prove the stated accusations, irrelevant, and multiple hearsay," and "[t]he Court overruled the defense objections." Plainly, this is not sufficient to identify exactly what objections defendant made to exactly what evidence, and exactly what rulings the trial court made on each of defendant's objections.

It must further be noted that of the 13 witnesses whose testimony defendant identifies as having been admitted in error, the testimony of four of those witnesses was either not subject to the prosecution's motion in limine and not addressed at the Evidence Code section 402 hearing, or the testimony that was addressed in the prosecution's motion is not the testimony about which defendant now complains.[12] As to these witnesses, defendant makes no effort to identify where in the record a specific objection to their testimony can be found.

Under these circumstances, we conclude defendant has not supported his claims of evidentiary error regarding the admission of statements that Jan made to others before her disappearance with adequate argument, and therefore we reject these points as not properly raised. (See, e.g., *People v. DeSantis* (1992) 2 Cal.4th 1198, 1224, fn. 8.)

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[12] These four witnesses are "nurse Nenneman"; "Sacramento Police Lieutenant Nenneman"; Jan's mother, Janis Thompson; and Jim Willoughby. The prosecution's motion did encompass a statement Jan made to her mother, but that statement is not the statement Jan made to Thompson that defendant complains on appeal was admitted in error.

There is one remaining area in which we reach a similar conclusion, albeit for a slightly different reason. This relates to testimony by Andrade to which defendant objected during trial. We turn to that issue.

Andrade was Jan's friend and coworker. The prosecutor asked if Jan told Andrade that she told defendant she was going to get a divorce, and Andrade answered "Yes." The prosecutor then asked, "And did she tell you what his response was?" Andrade responded, "That he didn't want the divorce and he wanted to work on the relationship." Defense counsel objected that Andrade's answer was "multiple hearsay because it is relating ultimately what Mr. Scharf said to Ms. Scharf." In a bench conference, the prosecutor argued that defendant's statement to Jan was admissible as "a statement of a party opponent," so there was "only really one level of hearsay." As to Jan's statement to Andrade, the prosecutor argued it was admissible to explain Jan's actions and as evidence of her state of mind. The trial court overruled the objection.

On appeal, defendant contends that "[m]ultiple hearsay is not admissible unless each level of hearsay falls within an exception to the hearsay rule." That is true, but it falls to defendant (as the appellant) to demonstrate the trial court erred in admitting this testimony. Thus, while a hearsay objection at trial may have been sufficient to preserve the claim of error for appellate review, on appeal defendant must show the admission of the evidence was actually erroneous. To do so, it is not enough for defendant to cite the general rule

that each level of hearsay must fall within an exception to the hearsay rule; instead, he must persuade us, at the very least, that the hearsay exceptions the prosecution offered to justify admission of the evidence do not apply.

Defendant has failed to carry this burden because he has not offered any argument addressing the prosecution's theory of admissibility. Instead, he simply argues that "[n]o hearsay exception applied to render Jan's statements to third parties attributing statements to [him] admissible." Because defendant has not supported this claim of error with adequate argument, we reject this point as not properly raised as well. (See *People v. DeSantis*, *supra*, 2 Cal.4th at p. 1224, fn. 8.)

C

Lynn Watson's Testimony

Before trial, the prosecution sought permission to offer the testimony of Lynn Watson, who was in a relationship with defendant from approximately 1988 through 1990. According to the prosecution's offer of proof, Watson would testify that defendant "threatened her with bodily harm more than once" and "shoved her in the past." Watson would also testify that when she confronted defendant upon learning he was married to Jan, "he became very aggressive and started threatening her," saying "such things as, 'I'll do you in; I'll disrupt your life; I'll destroy your life; I'll get even with you; I'll disrupt your life so bad you'll never have a life.'" After Watson left California in 1990, in part to get away from defendant, he managed to locate her within three weeks. In approximately

1995, and again in 2001, defendant contacted her when she visited California. Finally, Watson would testify that defendant told her "no woman was ever going to screw him over again like Susan (his first wife did)" because "he had lost his home in that divorce."

The prosecution argued that defendant's "acts of aggression, threats and stalking" toward Watson were admissible pursuant to Evidence Code sections 1109 and 1101, subdivision (b). Defendant objected to the admission of Watson's testimony, asserting the alleged acts of violence were more than 10 years old and "minimally violent," the threats "were not in fact physical threats," and the statement about his previous divorce did not show "any common plan or scheme."

The trial court overruled the objections, stating:

"[A] pivotal issue in this case is going to be why would Mr. Scharf want to harm his wife.

"Number one, the evidence from Ms. Watson indicates that he was very much preoccupied with losing his assets. That he said something like: I'm not going to be screwed over again like his first wife did and then he lost his home.

"He seemed to have the same preoccupation in the ongoing divorce with Ms. Scharf, that he was afraid that she was going to get half his retirement.

"So there is that similarity in the circumstances as described by Ms. Watson.

“Then does Mr. Scharf have a character propensity for doing harm to another for reasons of being rejected in a personal relationship by a woman?

“And the circumstances of Ms. Watson demonstrated that once she confronted him about being married, I notice he was having an affair with her soon after he was married to Ms. Scharf, apparently. He became aggressive and threatening, hounding her by calling her day and night, making such statements as: I’ll do you in, I’ll get even with you, I will disrupt and destroy your life.

“So there’s an element of that that demonstrates he cannot tolerate rejection by a female, which is also consistent with some of the circumstances we’ve heard about in his relationship with Ms. Scharf, that he did not want the divorce, that he was hounding her, that he was checking up on her, going through her things, checking her computer, trying to call off the man she lined up through the computer service.

“And the circumstances of Ms. Watson show how resourceful Mr. Scharf is in still being able to locate Ms. Watson despite her leaving the state, despite her apparently coming back to California and he again locating her through the phone.

“And we know that the kind of domestic violence that qualifies under 1109 does not have to be actual physical harm but can be threats of bodily harm.

“So I think the evidence, even though it is remote in time, has striking similarity to the circumstances of this case and demonstrates, number one, Mr. Scharf might have a propensity

towards violence, might be the person who is capable of doing harm to someone after being rejected by a woman in a personal relationship.

"I think it could also go to establish his common mode, scheme, and design under 1101(b) and his motive for why he might have intended to do harm to Ms. Scharf because he threatened harm to Ms. Watson for rejecting him.

"So I think this evidence has significant probative value under 1101(b) and 1109, and that its probative value is outweighed by its prejudicial effect. So I will allow that evidence."

1. *Evidence Code Section 1109*

Defendant first contends the trial court erred in admitting Watson's testimony under Evidence Code section 1109 because the shoving incidents did not constitute domestic violence. We agree the trial court erred in relying on that statute.

At the outset, it is important to emphasize that in reviewing defendant's claims of error regarding Watson's testimony, we consider the proposed testimony contained in the prosecution's pretrial offer of proof and not the testimony Watson actually gave at trial.[13] The proposed testimony was what

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[13] At trial, Watson testified she began dating defendant after meeting him in April 1988, through an ad in a singles paper. Upon discovering in February or early March 1990, that he had married Jan in December 1988, she terminated her relationship with him. Defendant became very angry and threatened to disrupt her life. Watson further testified that in June 1990, she moved from the Sacramento area to Ohio, and defendant sent her flowers there, even though she had not told him where she was moving.

defendant objected to and what the trial court ruled on, and it is that ruling we review for error.

Under certain circumstances, Evidence Code section 1109 authorizes the admission of evidence of a defendant's commission of other domestic violence to prove the defendant committed an offense involving domestic violence. The statute defines "domestic violence" as "intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable apprehension of imminent serious bodily injury to himself or herself, or another."[14] (Pen. Code, § 13700, subd. (a); Evid. Code, § 1109, subd. (d)(3).)

The People contend that when defendant shoved Watson, he attempted to cause her bodily injury and therefore committed an act of domestic violence. We disagree. Although a shove certainly *could* constitute an attempt to cause bodily injury, not every shove necessarily rises to that level. Here,

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Then, in 1991 or 1992, when she was visiting her sister in Roseville, defendant called her to tell her he knew she was in town. The same thing happened again in 1997 and 2001. Watson testified there were one or two incidents where she was in his way, and he angrily shoved her out of the way. Also, subject to a continuing objection for relevance, Watson testified that defendant told her his previous wife, Susan, "had gotten the house in the divorce, and that he was not going to . . . allow another woman to do to him what Susan had done."

[14] Such an act, which is defined as "abuse" by subdivision (a) of Penal Code section 13700, constitutes "domestic violence" when it is "committed against an adult or a minor who is a spouse, former spouse, cohabitant, former cohabitant, or person with whom the suspect has had a child or is having or has had a dating or engagement relationship." (Pen. Code, § 13700, subd. (b).)

according to the prosecution's offer of proof, Watson would testify only that defendant "shoved her." The offer of proof did not describe the force of the shove or the consequences of the shove or offer any other fact about the circumstances of the shoving incident or incidents that would allow a reasonable finder of fact to determine that defendant was attempting to injure Watson. Accordingly, defendant is correct that the shoving incidents, as described in the offer of proof, did not constitute domestic violence.[15]

Likewise, Watson's proposed testimony that "[d]efendant . . . threatened her with bodily harm more than once" was not sufficient to establish domestic violence. To constitute domestic violence, a threat must place the person threatened "in reasonable apprehension of *imminent serious bodily injury* to himself or herself, or another." (Pen. Code, § 13700, subd. (a), italics added.) There was nothing in the prosecution's offer of proof to suggest that any of the threats defendant allegedly made to Watson justified a reasonable apprehension of imminent serious bodily injury to anyone.[16]

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[15] We note that Watson's actual trial testimony, even if considered, would not change our analysis, as all she added at trial was that defendant shoved her when she was "in his way." This tends to suggest that defendant was trying only to move her, not injure her.

[16] One of the threats defendant allegedly made was, "I'll do you in," but that threat must be read in context with the others: "I'll disrupt your life; I'll destroy your life; I'll get even with you; I'll disrupt your life so bad you'll never have a life." As Watson explained at trial, she did not

Accordingly, to the extent the trial court relied on Evidence Code section 1109 as a basis for admitting Watson's testimony of defendant's threats and shoves, the trial court erred.

2. *Evidence Code Section 1101*

Defendant next contends the trial court erred in admitting Watson's testimony pursuant to Evidence Code section 1101 "under a common scheme or plan theory." According to defendant, there simply are not enough similarities between his conduct toward Watson and his alleged murder of Jan to find a common scheme or plan.

"Subdivision (a) of section 1101 prohibits admission of evidence of a person's character, including evidence of character in the form of specific instances of uncharged misconduct, to prove the conduct of that person on a specified occasion. Subdivision (b) of section 1101 clarifies, however, that this rule does not prohibit admission of evidence of uncharged misconduct when such evidence is relevant to establish some fact other than the person's character or disposition." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 393.) Such facts include "motive, opportunity, intent, preparation, plan, knowledge, identity, [and] absence of mistake or accident." (Evid. Code, § 1101, subd. (b).) As long as the prior act is relevant to prove something other than the defendant's

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"perceive [these threats] as he was going to harm me, but just disrupt my life."

disposition to commit such an act, Evidence Code section 1101 does not prohibit its admission.

"'The presence of a design or plan to do or not to do a given act has probative value to show that the act was in fact done or not done.' [Citation.] For example, a letter written by the defendant stating he planned to commit a certain offense would be relevant evidence in a subsequent prosecution of the defendant for committing that offense. [Citation.] The existence of such a design or plan also may be proved circumstantially by evidence that the defendant has performed acts having 'such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.'" (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 393.)

Defendant contends that his conduct toward Watson "bears no relevant similarity to the charged offense [the murder of Jan] and fails to qualify as common scheme evidence." The People, on the other hand, contend that "[b]oth the prior incident and the current incident demonstrate [defendant's] controlling nature and his inability to tolerate rejection by a woman in a personal relationship."

"[I]n establishing a common design or plan, evidence of uncharged misconduct must demonstrate 'not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.' . . . [¶] To establish the existence of a

common design or plan, the common features must indicate the existence of a plan rather than a series of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual. . . . [E]vidence that the defendant has committed uncharged criminal acts that are similar to the charged offense may be relevant if these acts demonstrate circumstantially that the defendant committed the charged offense pursuant to the same design or plan he or she used in committing the uncharged acts. Unlike evidence of uncharged acts used to prove identity, the plan need not be unusual or distinctive; it need only exist to support the inference that the defendant employed that plan in committing the charged offense." (*People v. Ewoldt*, *supra*, 7 Cal.4th at pp. 402-403.)

Here, Watson's proposed testimony that defendant told her "no woman was ever going to screw him over again like Susan (his first wife did)" because "he had lost his home in that divorce," is like the example in *Ewoldt* of a person who wrote a letter containing a plan to commit a certain act. Although defendant's statement did not exactly amount to a *plan* to harm any woman who might divorce him in the future, it suggested defendant harbored an intent or a motive to do so. However it is characterized -- whether as evidence of intent, plan, motive, or something else -- defendant's statement to Watson was relevant to prove something other than his disposition to commit a certain type of act and therefore it was not inadmissible under Evidence Code section 1101.

Our conclusion on this point is supported by several decisions of our Supreme Court. In *People v. Rodriguez* (1986) 42 Cal.3d 730, a prosecution for the murder of two highway patrol officers, "the trial court admitted testimony of several prosecution witnesses that at various times in 1978 they had heard [the defendant] express contempt and hatred for police and declare that he would kill any officer who attempted to arrest him." (*Id.* at pp. 742, 756.) On appeal, the defendant contended the evidence should have been excluded as inadmissible character evidence under Evidence Code section 1101. The Supreme Court rejected that argument on the following grounds: "In relying on Evidence Code section 1101, appellant assumes that the statements in question constituted 'conduct' and that they were introduced to prove his 'disposition' to commit the crimes rather than to show 'motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident' (Evid. Code, § 1101, subd. (b)). A defendant's threat against the victim, however, is relevant to prove intent in a prosecution for murder. [Citation.] The statements here in question did not specify a victim or victims but were aimed at any police officer who would attempt to arrest appellant. Such a generic threat is admissible to show the defendant's homicidal intent where other evidence brings the actual victim within the scope of the threat. [Citations.] Hence the statements were relevant and not excludable under Evidence Code section 1101." (*Id.* at pp. 756-757, fn. omitted.)

Our Supreme Court reached similar conclusions in *People v. Karis* (1988) 46 Cal.3d 612, 634-636 (evidence of the defendant's prior statement that "he would not hesitate to eliminate witnesses if he committed a crime") and *People v. Lang* (1989) 49 Cal.3d 991, 1013-1016 (evidence of the defendant's prior statement that he would "'waste any mother fucker that screws with me'").

Here, defendant's statement to Watson that "no woman was ever going to screw him over again like Susan (his first wife did)" because "he had lost his home in that divorce" was an implied threat against any future spouse who tried to divorce him. Because Jan fell within the scope of that threat, the statement was admissible to show his intent or motive to kill Jan and therefore was not barred by Evidence Code section 1101.

As for defendant's conduct toward Watson -- shoving her, threatening to destroy her life when she confronted him about being married, and contacting her several times over a period of years after they broke up -- that conduct was not admissible under a common scheme or plan theory because it simply did not have any features in common with the charged offense, which was defendant's murder of Jan. Even if we accept the People's contention that defendant's conduct toward Watson showed his "controlling nature and his inability to tolerate rejection by a woman in a personal relationship," that contention proves only that Watson's testimony would tend to prove *traits of defendant's character*, which is exactly what evidence of prior

conduct *cannot* be used to prove under Evidence Code section 1101.

That leaves us with the question of whether the evidence of defendant's conduct toward Watson might nonetheless have been relevant to prove some fact other than a common scheme or plan. The People note that the trial court found Watson's testimony relevant to prove defendant's motive also and point out that defendant "does not challenge this ruling on appeal." Normally, this would end our inquiry, since to demonstrate error in the admission of Watson's testimony under Evidence Code section 1101, it would normally be incumbent on defendant to persuade us her testimony was not relevant to prove *any* fact other than his disposition, including the fact of motive, which the trial court ruled the evidence *was* relevant to prove. Irrespective of the relevancy issue, however, defendant contends the trial court abused its discretion under Evidence Code section 352 in admitting Watson's testimony, and in analyzing that question we must consider the probative value of the evidence. Thus, one way or another, we must consider whether defendant's conduct toward Watson was relevant to prove defendant had a motive to kill Jan. We conclude it was not.

A leading commentator on the use of uncharged misconduct evidence has explained that the use of uncharged misconduct to prove motive generally takes two forms. (Imwinkelried, Uncharged Misconduct Evidence (rev. ed. 2006) § 3.18 at p. 3-95.) "In one form, . . . the act of uncharged misconduct supplies the motive for the charged crime. . . . The uncharged

act is cause, and the charged act is effect. In the second form, . . . the act of uncharged misconduct evidences the motive; the motive is again cause, the uncharged act is one effect, and the uncharged act tends to show the motive that produces the charge[d] act, the other effect. Both crimes are explainable as a result of the same motive." (*Id.* at pp. 3-98-3-99, fns. omitted.)

An example of the first type of case would be a prosecution for attempted murder based on the defendant firing at police where the prosecution offered evidence of robberies the defendant had committed and was under investigation for, on the theory that the defendant "fired on police . . . in order to avoid going back to prison for the robberies." (*People v. Daly* (1992) 8 Cal.App.4th 47, 55-56.) In that case, the robberies tended to prove the defendant had a motive to murder the police who were pursuing him.

This is not such a case. Nothing about defendant's conduct toward Watson could reasonably be construed as supplying him with a motive to kill Jan. Thus, Watson's testimony about that conduct could have been admissible to prove motive only under the second theory of admissibility we have mentioned. Under that theory, defendant's conduct toward Watson would be relevant if it tended to show a motive that also underlay his murder of Jan. The problem with this approach is that it is virtually indistinguishable from the prohibited use of uncharged misconduct to prove a propensity to act in a certain way.

Let us assume a reasonable trier of fact could conclude that defendant's conduct toward Watson when she confronted him about being married and his subsequent contacts with her were motivated by excessive possessiveness toward the women in his life. It could be argued that this possessiveness likewise motivated his killing of Jan, with her murder before their divorce could be finalized being perhaps the ultimate act of possessiveness. Thus, defendant's conduct toward Watson could be admitted to prove he had a motive to murder Jan. The problem with this reasoning is that it is really just "'propensity evidence under a different name.'" (Imwinkelried, *supra*, § 3.18, at p. 3-140, quoting Lempert & Saltzburg, A Modern Approach to Evidence (2nd ed. 1982) pp. 226-227.) Defendant's conduct toward Watson proves a character trait -- possessiveness toward women -- which is offered to prove defendant acted in conformity with that trait when he killed Jan. This is exactly the way uncharged misconduct evidence is *not* to be used.

As the People do not suggest any other fact that defendant's conduct toward Watson tended to prove, we conclude the trial court abused its discretion in determining evidence of that conduct was admissible.

We conclude, however, that the court's abuse of discretion was harmless because defendant has failed to show a reasonable probability the jury would have a reached a result more favorable to him had that evidence been excluded. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) The conduct at issue -- shoving, threats to ruin her life, and some sporadic contacts

after they broke up -- was not particularly inflammatory, and indeed paled in comparison to the crime with which defendant was charged. Moreover, this conduct was far less damning than defendant's statement to Watson (which we have determined already was properly admitted) that his previous wife, Susan, "had gotten the house in the divorce, and that he was not going to allow another woman to do to him what Susan had done." Under these circumstances, there is simply no basis in reason to believe the jury would have acquitted defendant if Watson had not testified about his conduct toward her. Thus, the error in the admission of Watson's testimony was harmless.

Having reached this conclusion, we reject defendant's constitutional argument that the erroneous admission of the evidence violated his due process rights. The admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial fundamentally unfair. (*People v. Partida* (2005) 37 Cal.4th 428, 439.) The admission of Watson's testimony about defendant's conduct toward her did not result in an unfair trial.

IV

Use Of CALJIC No. 2.50.02

Defendant argues that the trial court erred in giving CALJIC No. 2.50.01, but concedes our Supreme Court rejected his arguments in *People v. Reliford (*2003) 29 Cal.4th 1007, 1016. We agree and are bound by that opinion. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

V

Prosecutorial Misconduct

Defendant contends the prosecutor committed misconduct during closing argument by urging the jurors to be swayed by sympathy, attempting to shift the burden of proof, and arguing facts not in evidence. Anticipating a claim of forfeiture, defendant further contends that all of this alleged misconduct is reviewable on appeal even though his trial attorney did not object.

For the reasons that follow, we conclude all defendant's claims of prosecutorial misconduct were forfeited by the failure to object in the trial court, and defendant has failed to show the requisite prejudice from his trial counsel's failure to object.

"As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion--and on the same ground--the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety." (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) To avoid this rule, defendant offers four arguments, none of which is persuasive.

A

Sua Sponte Duty

Defendant contends the trial court had a "sua sponte duty to cure" what he contends was the prosecutor's misconduct during oral argument, even though defense counsel did not bring this alleged misconduct to the trial court's attention. We disagree.

The authorities defendant cites support the general proposition that the trial court has a duty "to control all proceedings during the trial, and to limit . . . the argument of counsel to relevant and material matters." (Pen. Code, § 1044.) They do not, however, support defendant's contention that the trial court has a sua sponte duty to cure what the defendant perceives as misconduct during closing argument. Indeed, our Supreme Court has declared that "a trial court has no sua sponte duty to control prosecutorial misconduct." (*People v. Carrera* (1989) 49 Cal.3d 291, 321.) Thus, defendant's first attempt to avoid forfeiture fails.

B

Incurable Misconduct

"A defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile. [Citations.] In addition, failure to request the jury be admonished does not forfeit the issue for appeal if '"an admonition would not have cured the harm caused by the misconduct."'" (*People v. Hill* (1998) 17 Cal.4th 800, 820.)

Here, defendant contends "[t]he misconduct discussed in this argument was incurable. Hence, the misconduct at issue is reviewable despite trial counsel's failure to object." The problem is this is defendant's *entire* argument on the point. He makes no attempt to explain what harm he contends flowed from each of the instances of misconduct he alleges, let alone why that harm could not have been cured by a timely admonition to the jury. This omission is particularly egregious because

defendant asserts multiple comments by the prosecutor that he contends amounted to misconduct.

Because defendant has not supported his claim of incurable misconduct with adequate argument, we reject this point as not properly raised. (See *People v. DeSantis*, *supra*, 2 Cal.4th at p. 1224, fn. 8.)

C

Discretionary Authority

Defendant next contends this court has the discretion to review his claims of prosecutorial misconduct despite his trial attorney's failure to object in the trial court. This is true. (See, e.g., *People v. Williams* (1998) 17 Cal.4th 148, 162, fn. 6 [appellate court generally has discretion to review claim of error not preserved for review by party].) However, we decline to exercise that discretion here. There is nothing about the alleged misconduct in this case that warrants appellate review despite defendant's forfeiture.

D

Assistance Of Counsel

Defendant next contends we can reach the issue of prosecutorial misconduct "by inquiring into the competence of trial counsel." According to defendant, "there can be no plausible rational tactical purpose for trial counsel not to object to the repeated, egregious instances of prosecutorial misconduct" here.

"Generally, a conviction will not be reversed based on a claim of ineffective assistance of counsel unless the defendant

establishes *both* of the following: (1) that counsel's representation fell below an objective standard of reasonableness; *and* (2) that there is a reasonable probability that, but for counsel's unprofessional errors, a determination more favorable to defendant would have resulted. [Citations.] If the defendant makes an insufficient showing of either one of these components, the ineffective assistance claim fails." (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1126.)

Here, defendant makes no effort to establish the second element of his ineffective assistance of counsel claim. Rather than attempt to explain why there is a reasonable probability that, but for his trial attorney's failure to object to the alleged prosecutorial misconduct during closing argument, a determination more favorable to him would have resulted, defendant simply "incorporates by reference the prejudice discussion" in an earlier section of his brief. In that earlier prejudice discussion, defendant essentially repeats his assertion that "the trial evidence was insufficient to support the murder conviction." Thus, in defendant's view, because the evidence was insufficient to support his conviction, it follows that the jury would have acquitted him (or at least convicted him of a lesser crime) if his trial attorney had objected to the alleged prosecutorial misconduct in closing argument.

This argument is a non sequitur. Thus, defendant has failed to show a reasonable probability of a more favorable result, and his claim of ineffective assistance of counsel fails.

VI

Defendant's Eligibility For Probation

At sentencing, both the prosecutor and defense counsel agreed the court had no discretion because there was only one legal sentence the court could impose for defendant's crime. The court agreed and imposed a sentence of 25 years to life in prison, after finding that defendant was "not eligible for probation due to the nature of [his] conviction."

On appeal, defendant contends the trial court erred in determining he was not eligible for probation. According to defendant, the information did not "plead any statute or facts which would render [him] ineligible for probation," "[t]he jurors were not asked to make any special factual findings relevant to probation eligibility," and "[n]o statutory restriction applies to render [him] ineligible for probation."

There is no statutory provision that rendered defendant absolutely ineligible for probation.[17] Thus, the trial court's statement that defendant was "not eligible for probation due to the nature of [his] conviction" was incorrect. Defendant was, however, *presumptively* ineligible for probation because of the nature of his conviction. As the People point out, under subdivision (e)(3) of Penal Code section 1203, "Except in

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[17] The probation report stated that "statutory provisions prohibit a grant of probation" "[a]s the defendant was convicted of an offense punishable by an indeterminate sentence of imprisonment." The People have not identified any such statutory provision nor have we found one.

unusual cases where the interests of justice would best be served if the person is granted probation, probation shall not be granted to" "[a]ny person who willfully inflicted great bodily injury . . . in the perpetration of the crime of which he or she has been convicted." "[S]ince murder can never be committed without the infliction of great bodily injury" (*People v. Superior Court (Guerrero)* (1962) 199 Cal.App.2d 303, 309), it follows that defendant was ineligible for probation under Penal Code section 1203 *unless* his was an unusual case "where the interests of justice would best be served" by granting him probation (Pen. Code, § 1203, subd. (e)).

"If the defendant comes under a statutory provision prohibiting probation 'except in unusual cases where the interests of justice would best be served,' . . . the court should apply the criteria in subdivision (c) to evaluate whether the statutory limitation on probation is overcome; and if it is, the court should then apply the criteria in rule 4.414 to decide whether to grant probation." (Cal. Rules of Court, rule 4.413(b).)

Here, the trial court did not evaluate whether the statutory limitation on probation that applied to defendant was overcome by any of the criteria in California Rules of Court, rule 4.413(c)[18] or any other criteria.[19] Consequently, the court

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[18] California Rules of Court, rule 4.413(c) provides: "The following facts may indicate the existence of an unusual case in which probation may be granted if otherwise appropriate:

erred; the question is whether that error was prejudicial.

Defendant suggests that when a trial court denies probation based on an incorrect belief about the defendant's eligibility

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"(1) (Facts relating to basis for limitation on probation) A fact or circumstance indicating that the basis for the statutory limitation on probation, although technically present, is not fully applicable to the case, including:

"(i) The fact or circumstance giving rise to the limitation on probation is, in this case, substantially less serious than the circumstances typically present in other cases involving the same probation limitation, and the defendant has no recent record of committing similar crimes or crimes of violence.

"(ii) The current offense is less serious than a prior felony conviction that is the cause of the limitation on probation, and the defendant has been free from incarceration and serious violation of the law for a substantial time before the current offense.

"(2) (Facts limiting defendant's culpability) A fact or circumstance not amounting to a defense, but reducing the defendant's culpability for the offense, including:

"(i) Defendant participated in the crime under circumstances of great provocation, coercion, or duress not amounting to a defense, and the defendant has no recent record of committing crimes of violence.

"(ii) The crime was committed because of a mental condition not amounting to a defense, and there is a high likelihood that the defendant would respond favorably to mental health care and treatment that would be required as a condition of probation.

"(iii) The defendant is youthful or aged, and has no significant record of prior criminal offenses."

19 Rule 4.408(a) of the California Rules of Court provides, "The enumeration in these rules of some criteria for the making of discretionary sentencing decisions does not prohibit the application of additional criteria reasonably related to the decision being made. Any such additional criteria shall be stated on the record by the sentencing judge."

for probation, "[a] remand for resentencing with a correct understanding of the scope of the Court's authority and discretion is required." That is not necessarily so, however, at least under state law. In determining whether a case where the defendant is presumptively ineligible for probation is so unusual that the statutory limitation on probation is overcome, the trial court exercises discretion. (See *People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 831 [standard of review is abuse of discretion].) "[A] failure to exercise a discretion required by law" is "the practical equivalent of an abuse of discretion." (*People v. Beasley* (1970) 5 Cal.App.3d 617, 633.) Thus, when a trial court fails to determine whether a case in which the defendant is presumptively ineligible for probation is so unusual that the statutory limitation on probation is overcome, the trial court abuses its discretion. But the defendant who seeks reversal of the judgment against him based on an abuse of discretion still bears the burden of demonstrating that the abuse of discretion was *prejudicial*. (See *People v. Ruiz*, *supra*, 44 Cal.3d at p. 605 [burden on challenging consolidation or denial of severance of criminal charges].) In the present context, such prejudice exists only if there is a reasonable prospect that the trial court would have found the case unusual, had it considered that question. If the defendant does not show a reasonable probability that the

trial court would have found the statutory limitation on probation overcome based on the criteria in California Rules of Court, rule 4.413 or similar considerations,[20] then the defendant has failed to demonstrate a prejudicial abuse of the trial court's discretion.

Here, defendant has offered no argument on whether there is a reasonable probability the trial court would have found the statutory limitation on probation overcome if it had considered that question. In the absence of such argument, defendant cannot carry his burden of demonstrating a prejudicial abuse of discretion.

This ends our inquiry under state law. Defendant, however, also argues that the trial court's failure to consider probation in this case violated his federal constitutional right to due process, both procedural and substantive. Unfortunately, defendant does nothing to develop this argument, which in its

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[20] California Rules of Court, rule 4.413 "is not on its face exclusive in its list of circumstances which may take a defendant out of presumptive ineligibility for probation. [Citation.] However, . . . the language of the rule is not to be read expansively. . . . The rule itself, although purporting merely to give examples, does so in a limited context. That is, both subdivisions . . . give examples of *particular types of facts*: facts showing that the circumstance giving rise to the probation restriction is of borderline applicability, or that the defendant's culpability, in a moral or ethical sense, was less than would be typically true. The rule does not purport to give the trial court authority to decide that any other particular type of factor may be used to meet the 'unusual' standard." (*People v. Superior Court (Dorsey)* (1996) 50 Cal.App.4th 1216, 1227.)

entirety reads as follows: "The denial of this state law procedural right violated Procedural Due Procdess [*sic*]. [Citations.] [¶] To the extent that it was a state law error, the Court's error also violated the federal [C]onstitution's guarantee of Substantive Due Process. [Citations.]"

Because defendant has not supported his claim of federal constitutional error with adequate argument, we reject this point as not properly raised. (See *People v. DeSantis*, *supra*, 2 Cal.4th at p. 1224, fn. 8.)

VII

Judicial Misconduct

After pronouncing defendant's sentence, the trial court had "some additional comments" for him. Remarking on an allegation that defendant had attempted to kill himself, the court told him, "I believe you still have it within your power to give some meaning to the rest of your life." After noting testimony by defendant's first wife that he was once "a very religious man and active in the church," the court made a plea to defendant to "reveal the location of Jan Scharf's body," concluding, "It is the decent thing to do. It is the right thing to do. Do the right thing, Mr. Scharf. And if you do, you may yet have some chance at salvation."

Defendant contends the court's comments constituted judicial misconduct because they "created an improper appearance of bias and violated the Establishment Clause." We find no merit in these arguments.

A

Forfeiture

The People contend that defendant's "failure to object to the trial judge's comments at the sentencing hearing forfeits his claim on appeal." We disagree.

"As a general rule, judicial misconduct claims are not preserved for appellate review if no objections thereto were made at trial. [Citation.] Nonetheless, a defendant's failure to object does not preclude review 'when an objection and an admonition could not cure the prejudice caused by' such misconduct." (*People v. Perkins* (2003) 109 Cal.App.4th 1562, 1567.)

The People contend an objection was needed here because "an objection would have necessarily provided the trial judge with the opportunity to clarify any alleged ambiguity in his remarks." But defendant is not complaining that the court's comments were ambiguous; he is complaining that they evidenced judicial bias and violated the establishment clause. Assuming for the sake of argument that the court's comments did evidence bias and violate the establishment clause, we fail to see how an objection to those comments could have made any difference. Accordingly, defendant's arguments were not forfeited.

B

Bias

The court's plea to defendant to reveal the location of Jan's body implied that the court believed defendant murdered Jan. Based on this fact, defendant argues that the court's

"expression of an opinion of guilt . . . was an improper expression of judicial bias."

We disagree. Had the trial court offered comments before or during the trial that suggested a belief in defendant's guilt, those comments might have shown bias and might have called into question the fairness of the trial. Here, however, the court made its comments *after the jury had found defendant guilty*. Having heard all of the evidence, the judge had as much right as the jury to believe defendant murdered Jan. Indeed, in performing his obligations as the sentencing judge, he was obliged to carry out the jury's verdict of guilt and act on the premise that defendant murdered Jan, whatever his personal belief may have been. Under these circumstances, the judge's plea to defendant to reveal the location of Jan's body was not an improper expression of judicial bias.

C

Establishment Clause

As defendant himself admits, the nature of the court's comments was an "appeal[] to [his] religious convictions." Defendant contends this appeal violated the establishment clause of the First Amendment to the United States Constitution. Again, we disagree.

The establishment clause of the First Amendment, which provides that "'Congress shall make no law respecting an establishment of religion,'" applies to the states through incorporation in the due process clause of the Fourteenth Amendment. (*Smith v. Fair Employment & Housing Com.* (1996) 12

Cal.4th 1143, 1180.) The establishment clause "was intended to protect against three main evils: (1) sponsorship, (2) financial support of religion by the civil government, and (3) active involvement of the sovereign in religious activity." (*Rowe v. Superior Court* (1993) 15 Cal.App.4th 1711, 1726.)

In *Lemon v. Kurtzman* (1971) 403 U.S. 602 [29 L.Ed.2d 745], the United States Supreme Court "set forth a standard for evaluating statutory violations of the establishment clause finding no violation if the following were proven: 'First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster "an excessive government entanglement with religion."'" (*Rubin v. City of Burbank* (2002) 101 Cal.App.4th 1194, 1200.)

To ascertain the primary effect of a statute or other governmental action under the second prong of the *Lemon* test, some courts apply what they call the "endorsement" test, "asking whether or not a reasonable observer would believe that a particular action constitutes an endorsement of religion by the government." (*ACLU of Ohio Foundation, Inc. v. Ashbrook* (6th Cir. 2004) 375 F.3d 484, 492.)

Relying on the endorsement test, defendant contends "[t]he Court's comments would be viewed by a reasonable observer as an endorsement of religion." According to defendant, "The comments conveyed the message that [he] would be condemned to Hell unless he confessed," and "[a] secular law judge has no authority to condemn people to Hell."

We do not agree that the trial court's comments at sentencing would be viewed by a reasonable observer as an endorsement of religion by the court. The court prefaced its comments by referring to the testimony of defendant's former wife that *defendant* "at one time [was] a very religious man and active in the church."[21] Thus, when the court ultimately stated that if defendant revealed the location of Jan's body, he might "yet have some chance at salvation," a reasonable observer would not have viewed the court as personally endorsing religion, but merely appealing to defendant's *own* religious beliefs (assuming he still held them) to solicit an act the court believed would "give . . . some semblance of peace" to Jan's friends and family. The court did not have to share or endorse defendant's apparent religious beliefs to make an appeal to them.

In a supplemental letter brief, defendant contends his establishment clause argument is supported by two recent United States Supreme Court cases -- *Van Orden v. Perry* (2005) 545 U.S. ___ [162 L.Ed.2d 607] and *McCreary County v. ACLU* (2005) 545 U.S. ___ [162 L.Ed.2d 729]. Although he quotes both decisions at some length, in the end defendant's argument relies on a single passage from *McCreary*, in which the court stated, "The prohibition on establishment covers a variety of issues from

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[21] Defendant's former wife testified that she and defendant "were formerly Jehovah's Witnesses and full-time parishioners, and we went door to door. And that was our area was around Isleton and the Rio area. And we literally drove down every road in that -- in about 1600 square miles."

prayer in widely varying government settings, to financial aid for religious individuals and institutions, *to comment on religious questions*." (*McCreary*, at p. ___ [162 L.Ed.2d at p. 756], italics added.) Emphasizing this final phrase, defendant contends the trial court's "exhortation in context could be understood only as a 'comment on religious questions' . . . in violation of the Establishment Clause."

This argument fails because the passage from *McCreary* on which defendant relies did not purport to define situations in which the establishment clause is always violated. Rather, at that point in the opinion, Justice Souter was explaining "[t]he importance of neutrality as an interpretative guide" because "[i]n these varied settings, issues about interpreting inexact Establishment Clause language . . . arise from the tension of competing values, each constitutionally respectable, but none open to realization to the logical limit." (*McCreary County v. ACLU*, *supra*, 545 U.S. at p. ___ [162 L.Ed.2d at p. 756].) Thus, government comment on religious questions is one of the varied settings in which establishment clause issues *may arise*, but not all such comment is prohibited by the establishment clause.

To the extent *McCreary* and *Van Orden* advocate reliance on the principal of neutrality in applying the establishment clause, they undermine defendant's argument. The trial court's appeal to defendant's religious beliefs (present or former) did not express the court's favor of one religion over another, or religion over no religion. At most, the trial court suggested that the revelation of the location of Jan's body would inure to

defendant's benefit *within the belief system of the religion to which defendant himself had once adhered and might still adhere*. Thus, even if the court's exhortation to defendant can be construed as a "comment on religious questions," defendant has failed to show that it is the sort of comment that contravened the principal of neutrality.

Because defendant's establishment clause argument has no merit, he has failed to show any judicial misconduct.

DISPOSITION

The judgment is affirmed.

ROBIE, J.

We concur:

NICHOLSON, Acting P.J.

BUTZ, J.